journ the hearing and refer the question to the Board?

An examination of the records of appeal clearly reveals that such a course of conduct was never taken by the appellants or their counsel. The applicability or otherwise of section 31 has never been part of the respondent's case as his case simply rests on commion law negligence. The appellants at first filed their Statement of Defence by simply denying negligence and it was only in their amended Statement of Defence filed on September 24, 1980 by their present solicitors that an alternative defence under section 31 of the Act was introduced. Paragraph 7A of the Amended Statement of Defence states:–

"7A. Further or in the alternative the Defendants contend that the Plaintiff is an insured person within the provisions of the Employees' Social Security Act 1969 and by virtue of Section 31 of the said Act is not entitled to receive or recover from the Defendant damages under any other law for the time being in force in respect of any employment injury sustained as an employee under the said Act."

Further, there is nothing in the amended Statement of Defence to show that the appellants objected to the jurisdiction of the High Court to determine the issue and in particular the question as to whether or not the respondent was an employee. It was only during the course of making his submission before the learned trial judge that counsel for the appellants raised the issue of jurisdiction by quoting to him sections 84, 90 and 91 of the Act. Such submission prompted counsel for the respondent to state in his reply:–

"Nothing in SOCSO Act to exclude jurisdiction of court in SOCSO matters."

From the review of the records it is clear that the issue of the Civil Court's lack of jurisdiction was never pleaded and that it was raised for the first time only at the last stage of the trial. No application was made by the appellants to amend the defence, nor did they take any action to have the hearing adjourned so that the question on employee could be referred to the Board for its decision. Thus we are of the view that the learned trial judge was right in not taking counsel's submission on this issue into consideration as it was made without a basis in that it was not supported by their own pleadings. In this connection it is relevant for us to quote the speech of Lord Edmund – Davies in *Farrell* v. *Secretary of State for Defence* [3]. Of pleadings his Lordship said:

"For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it."

Quite apart from this technical objection, counsel's submission is also untenable because the issue which the learned trial judge was called upon to decide is really on the interpretation of section 31 of the Act and not on the question of the respondent being an employee within the meaning of the Act, although such question is crucial to the main issue. Section 84 of the Act does not enact that the applicability or otherwise of section 31 lies with the Board. Indeed it will be unconstitutional as it is contrary to Article 121 of the Federal Constitution if the Act were to arrogate the interpretation of this section to the Board. The determination of a preliminary question as to whether or not the respondent was an employee is not only plainly a legal question but also an integral part of the interpretation of section 31 which is legally and constitutionally not within the competence of the Board to decide. Such being the case, we therefore cannot see how the learned trial judge could be held to have erred in deciding the issue.

Thus for the reasons given in the foregoing paragraphs we dismiss this appeal with costs. Deposit to respondent against taxed costs.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; G.T.Rajan & Co.*

HOTEL MALAYA SDN. BERHAD & ANOR v. NATIONAL UNION OF HOTEL, BAR AND RESTAURANT WORKERS & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. and Abdoolcader J.) June 26 & July 5, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 63 of 1982]

Industrial Law – Reference of questions of law to High Court – Whether reference can only be made by court handing down award – Expiry of appointment of Chairman of Industrial Court – Reference of questions of law made by differently constituted court – Whether in breach of natural justice – Industrial Relations Act, 1967, ss. 2, 20, 22, 23, 33 and 33A.

Administrative Law – Certiorari – Award made by Industrial Court – Expiry of appointment of Chairman – Reference of question of law arising from award made by

differently constituted court – Whether in breach of natural justice – Industrial Relations Act, 1967, s. 33A.

In this case the Industrial Court with Mr. K. Somasundram as Chairman had handed down two awards in relation to the dispute between the appellants and the first respondent. Subsequently Mr. K. Somasundram retired and on application, a differently constituted court referred certain questions of law arising out of the awards to the High Court under section 33A of the Industrial Courts Act, 1967. The appellants applied for an order of certiorari to quash the decision of the Industrial Court. It was contended that the differently constituted court had no jurisdiction to hear the applications to refer the questions of law to the High Court on the ground that it was not the same court that handed down the awards. The application was dismissed in the High Court and the appellants appealed.

Held: (1) the court which handed down the awards in this case had completed its business and therefore section 22(4) of the Industrial Court Act, 1967, did not apply in this case;

(2) in this case the differently constituted court could hear and determine the application as it was a new and different matter which was only consequential to and an aftermath of the awards handed down previously.

Cases referred to:

(1) *Garland* v. *Westminster City Council* [1970] 21 P. & C.R. 555.
(2) *Austin Reed Ltd.* v. *Royal Insurance Co. Ltd.* [1956] 1 W.L.R. 1339.
(3) *Re Rosenfeld and College of Physicians and Surgeons* (1970) 11 D.L.R. (3d)148.
(4) *R.* v. *Halifax City Council Committee of Works, ex parte Johnston* (1962) 34 D.L.R. (2d) 45, 57.
(5) *R.* v. *Huntingdon Confirming Authority* [1929] 1 K.B. 698.

[The following cases were also cited in argument – *Coates* v. *C.J. Crispin Ltd.* (1973) I.C.R. 413; *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* v. *South East Asia Fire Bricks Sdn. Bhd.* [1976] 2 M.L.J. 67 F.C.; *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union and Others* [1981] A.C. 363 (P.C.); [1980] 2 M.L.J. 165; *Cadija Umma & Anor.* v. *S. Don Manis Appu* [1939] A.C. 136 (P.C.) 1467, 1468; *Chua Chee Chor* v. *Chua Kim Yong & Ors.* [1962] 1 W.L.R. 1464; 1467, 1468 (P.C.); [1963] M.L.J. 17; *R.* v. *Broker-Dealers' Association of Ontario, Ex-parte Saman Investment Corporation Ltd.* (1971) 15 D. L. R. (3d) 385, 393-394; 397-398; *V. Subramaniam & 3 others* v. *Craigiele Estate, Bukit Pasir, Muar, Johore* (F.C.A. No. 61/77) pp. 4, 8; *Thompson* v. *Goold* [1910] A.C. 409, 420-1; *Johri Mal* v. *Director C of H Punjab* A.I.R. 1967 S.C. 1568, 1569.

FEDERAL COURT.

V. K. Palasuntharam (*Eugene Lye* with him) for the appellants.

D. P. Xavier for the 1st respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the Judgment of the Court): This is an appeal from the decision of Hashim Yeop A. Sani, J. dismissing the application of the appellants for an order of certiorari to quash the decision of the Industrial Court ('the Court') holding it had jurisdiction to hear and determine two applications under the provisions of section 33A of the Industrial Relations Act, 1967 ('the Act') to refer to the High Court certain questions of law that had arisen out of two awards made by a different panel of the court. To appreciate the arguments that have been raised before us it would be necessary to state a few facts.

On August 16, 1979 the Minister of Labour and Manpower referred two trade disputes between the National Union of Hotel, Bar and Restaurant Workers, the 1st respondent to this appeal, and Hotel Malaya Sdn. Bhd., Kuala Lumpur and Kuala Lumpur Restaurant Sdn. Bhd., the appellants, to the court. On May 30, 1981 the court composed of Encik K. Somasundram as Chairman and three members – Datuk K.K. Nair, Encik Jaffar Mohd. Ali and Encik Qua Chiew Peng – handed down two awards. Encik K. Somasundram has since retired. On September 18, 1981 the court constituted of Harun Mahmud Hashim, J., President of the court and three members – Datuk Chong Shih Guan, Encik Esa bin Haji Ahmad, and Encik R. Retnam – heard applications by the 1st respondent in relation to the two awards to refer certain questions of law arising out of both the awards to the High Court under section 33A of the Act. Counsel on behalf of the appellants unsuccessfully contended that that differently constituted Court had no jurisdiction to hear the applications on the ground that it was not the same court that handed down the awards on May 30, 1981. He argued that the same court which handed down the awards on May 30, 1981 should and indeed must hear the applications. It is said that the competence of the court to hear the applications goes to the very root of its jurisdiction and, where it is lacking, it is a case of inherent lack of jurisdiction.

The court after hearing argument held on October 31, 1981 in what it termed an interim award that it has jurisdiction to hear the two applications.

Pursuant to the leave granted by Hashim Yeop A. Sani, J. in the High Court to apply for an order of certiorari to quash the decision of the court dated October 31, 1981, the learned Judge after

hearing arguments with regard to the alleged defect or lack of jurisdiction in the court which heard the applications under section 33A of the Act, dismissed the application for certiorari. He was not prepared to analyse and dissect the language of section 33A to read into it the supposed requirement that the court as constituted which made the two awards in the first instance must hear the applications under section 33A of the Act. He was of the view that sub-section (4) of section 22 of the Act is an enabling provision, facilitating a member whose term of office has expired, to continue to sit in uncompleted proceedings, and since the proceedings had been finally disposed of when the court handed down its awards on May 30, 1981, that provision did not apply.

Before us counsel on behalf of the appellants starts with the submission, and we think that is his main ground, that the proceedings which had begun before the court presided by Encik K. Somasundram were not finally disposed of until the expiry of thirty days after the making of the award had expired (section 33A (3)), or, if an application was made under section 33A, until that application had been rejected or refused by the Industrial Court, or, if granted, until the determination by the High Court of the questions referred to it (section 33A (5)). He relies on the provisions of sub-section (4) of section 22 of the Act and two cases, *Garland* v. *Westminster City Council*[1] and *Austin Reed Ltd.* v. *Royal Insurance Co. Ltd.*[2]

Section 22 of the Act deals with the constitution of the court; sub-section (4) of section 22 of the Act is as follows:

"Any member of the court constituted under this section whose appointment expires during the proceedings of the court shall for the purpose of the proceedings continue to be a member of the court and the term of his appointment shall be deemed to have been extended until the final disposal of the trade dispute or matter."

Garland v. *Westminster City Council (supra)* was concerned with failure to comply with enforcement notices requiring the appellant in that case to demolish certain buildings. The short point about that case is that the enforcement notices would be of no effect if the appellant's appeal had not been "finally determined". The relevant statutory provision, section 46(3) of the Town and Country Planning Act 1962 enacts: "Where an appeal [to the Minister against an enforcement notice] is brought under this section, the enforcement notice shall be of no effect pending the *final determination* or withdrawal *of the appeal*", (emphasis supplied). It was held "that the time at which an appeal should, under the section, be considered as having been finally determined must be, at the latest, the time when an appeal to the Minister or from the Minister to the Divisional Court or from the Divisional Court to the Court of Appeal had been dismissed and the time for appealing further had expired without any such further appeal having been instituted." It is significant to note that that case was decided upon the construction of section 46(3) of that particular statute.

Austin Reed Ltd. v. *Royal Insurance Co. Ltd. (supra)* was a case concerning the date on which an application for the grant of a new tenancy was "finally disposed of" within the meaning of section 64 of the Landlord and Tenant Act, 1954. The facts do not concern us but the section, *inter alia*, provides that "the date on which an application is finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired ...". It was held that the application was "finally disposed of" when the application was refused by the judge, and the appeal from his decision was dismissed by the Court of Appeal and leave to appeal to the House of Lords was refused by the Court of Appeal and when the time within which a petition could be lodged with the House of Lords for leave to appeal had expired.

It is unnecessary and not within our province to cavil at the decisions of those two cases. Suffice it to say that they rested on the particular construction of the two provisions of the English statutes in question. Hashim Yeop A. Sani, J. has rightly expressed his view that they have no application to the facts of the present case. In our opinion, the reliance placed on those two authorities is misplaced. They have no bearing on the question that arises for decision here.

With all respect to the energy and persistence which counsel on behalf of the appellants has brought to his task, in our judgment, one only has to look at his submission superficially to see that it cannot be sustained.

It is axiomatic that the Act is a self-contained legislative enactment which, *inter alia*, established the court with power to resolve trade disputes referred to it and deal with references to it under sub-section (3) of section 20 of the Act. The Indus-

trial Court is constituted pursuant to the provisions of Part VII of the Act and includes, unless a contrary intention appears, any court under section 22 constituted for the purpose of dealing with any trade dispute or matter referred to it, and any division thereof (section 2). In practice there are five Divisions of the court, viz. the court consisting of the President and three members; and four other Divisions, each presided by a Chairman and three members (section 23). Encik K. Somasundram was one of its Chairmen. It exercises a quasi-judicial function. It gives a full reasoned judgment in the nature of an award (section 30). Its functions comprise an investigation of the facts, an analysis of the facts, findings of facts, and, lastly, the application of the law to those findings.

In our opinion, sub-section (4) of section 2 of the Act obviously refers to a situation which arises when the appointment of a member of the court expires during the proceedings of the court and in those circumstances he shall continue to sit as a member of that court for the purpose of completing the hearing of and determining any trade dispute or matter commenced before it. In simple language, that member continues to sit until the court hands down its award under section 30 of the Act, irrespective of the fact that his appointment as a member of that court has expired. It would be absurd to say that the fact that there is an application under section 33(A) of the Act prevents the final disposal of the trade dispute or reference already determined and in respect of which an award has been made by the court for the purposes of section 22(4) in the event, as in this case, when one of its members has ceased to be such after the award has been made.

In the circumstances, we are of the view that sub-section (4) of section 22 of the Act does not apply in the present case. The court which handed down its award on May 30, 1981 had completed its business.

Another ground which counsel on behalf of the appellants takes is of even less substance than the first. It relates to the construction of section 33A of the Act. In a nutshell it is said that the section envisages that the same members who constituted the court which handed down the awards on May 30, 1981, must hear the application under section 33A because they were familiar with the proceedings having taken part in them in the earlier stages and that a differently constituted Court would not possess first-hand knowledge of the substantive proceedings. That, it is submitted, can be gathered from the language used in paragraphs (c) and (d) of sub-section (1) of section 33A of the Act which read:

> "33A. (1) Where the court has made an award under section 30 (1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law –
>
> (c) which, in the opinion of the court, is of sufficient importance to merit such reference; and
>
> (d) the determination of which by the court raises, in the opinion of the court, sufficient doubts to merit such reference."

We are not impressed by the argument of counsel. Having regard to the language of the section which admittedly contemplates that the court mentioned therein is the court as defined in section 2 of the Act, it would, in our opinion, be a perfectly legitimate view to take that if the legislature did intend to make an exception to the language therein, it would have done so in clear and express terms, as it has done in sub-section (5) of section 33, instead of leaving it as a matter of mere inference from its provisions. Section 33 deals with the interpretation of an award or collective agreement with the object of removing ambiguity or uncertainty and subsection (5) is as follows:

> "(5) The expression "court" for the purpose of this section, means the *court by which the award was made* or any other court specially constituted under section 22 for the purpose." (emphasis supplied).

In our opinion, the legislature could very well have said in section 33A, if it had indeed intended to, "Where the court by which the award was made, may, in its discretion, refer to the High Court ...", instead of using in its present form "Where the court has made an award ...".

A further point taken by counsel on behalf of the appellants is the effect of the principles of natural justice. Shortly stated, it is a breach of natural justice for the freshly constituted court to participate in the decision of October 31, 1981, if it has not heard all the evidence given, and submissions made when the two awards were handed down at the earlier proceedings before the court presided by Encik K. Somasundram. The authorities cited to us, viz, *Re Rosenfeld and College of Physicians and Surgeons*[3] *R.* v. *Halifax City Council Committee of Works, ex p. Johnston*[4] and *R.* v. *Huntingdon Confirming Authority*[5] deal with an entirely different situation and it is therefore neither necessary nor pertinent to discuss these cases. We do not accede to the view expressed by counsel that this is a blatant case of a breach of natural justice. In our opinion, this is a case in

which the court presided by Harun, J., heard an application to refer to the High Court certain questions of law arising out of the two awards; it did not hear any evidence or hand down any award. It was a differently constituted court but a court nevertheless as defined in section 2 of the Act to hear and determine a new and different matter which was only consequential to and an aftermath of the awards handed down previously.

We accordingly dismiss the appeal with costs.
Appeal dismissed.

Solicitors: *Eugene Lye & Co., D.P. Xavier & Co.*

VOO MIN EN & ORS. v. LEONG CHUNG FATT

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Salleh Abas F.J.) May 13 & July 5, 1982]

[Kota Kinabalu – Federal Court Civil Appeal No. 198 of 1981]

Landlord and tenant – Lease – Lease required to be in writing and registered – Provision for renewal by written request – Alleged oral agreement to extend lease – Agreement valueless – Sabah Land Ordinance, ss. 88, 104 & 105.

Practice and procedure – Application for summary judgment – Point raised in defence not constituting triable issue – Oral agreement to renew written lease – Not effective.

Evidence – Lease in writing – Whether oral agreement to vary it admissible – Evidence Act, 1950, s. 92.

In this case the respondent was the lessee of premises in Kota Kinabalu. The lease was in writing and registered in accordance with section 104 of the Sabah Land Ordinance. It provided for the possibility of renewal by written request. The lease was for a period of 16 years commencing on January 16, 1965. On the expiration of the lease the respondent only delivered part of the premises to the appellant and retained the ground floor. The appellant claimed possession of the ground floor and in his defence the respondent alleged that there was an oral agreement for a new lease. The appellant applied for final judgment but this was refused as the learned trial judge held that there was a triable issue. The appellants appealed.

Held: (1) an option or right to renew a lease is always treated by the law as a privilege which must be exercised strictly within the terms in which the option or right is given, otherwise the option or right is lost. The alleged oral agreement in this case could not renew the lease as it is completely outside the purview of the clause for renewal in the lease;

(2) the oral agreement could not be admitted as to do so would be contrary to section 92 of the Evidence Act. As the lease in this case was required to be in writing by virtue of section 104 of the Sabah Land Ordinance and has been registered in accordance with the Ordinance, there is no way in which the respondent's alleged agreement could be proved under proviso (d) to section 92 of the Evidence Act.

(3) it is clear that the alleged agreement is valueless as it is neither in writing nor registered and is contrary to sections 88, 104 and 105 of the Sabah Land Ordinance:

(4) the point raised by the respondent as to the existence of the oral agreement to renew the lease of the demised premises in this case is not an arguable issue, as it is neither effective nor admissible and therefore does not constitute a triable issue. The appellants should therefore be allowed to sign final judgment against the respondent.

Cases referred to:–

(1) *West Country Cleaners (Falmouth) Ltd.* v. *Saly* [1966] 3 All E.R. 210, 212.
(2) *Leong Gan & Ors.* v. *Tan Chong Motor Co. Ltd.* [1969] 2 M.L.J. 8.
(3) *Mark D'Cruz* v. *Jitendra Nath Chatterjee* (1919) I.L.R. 46 Cal. 1079.
(4) *Cow* v. *Casey* [1949] 1 K.B. 474, 481.

FEDERAL COURT.

C.Abraham (*Alex Decena* with him) for the appellants.

Gerald Math for the respondent.

Salleh Abas F.J. (delivering the Judgment of the Court): This is an appeal from the decision of Wan Mohamed J. refusing the appellants' summons-in-chambers to sign final judgment to recover vacant possession of certain demised premises from the respondent.

The respondent was the lessee of the demised premises, i.e. the ground floor and the first floor of the building erected on lot 22, Block 33, Kampung Ayer, Kota Kinabalu. According to the lease agreement which he entered into with the first appellant, Voo Min En, the lease was for a period of sixteen years commencing on January 16, 1965. The lease was duly registered in accordance with section 104 of the Sabah Land Ordinance. On the expiration of the lease on January 16, 1981, only part of the demised premises, namely the first floor was delivered up by the respondent. He retained and still continues to retain the ground floor. When sued for the recovery of this floor the respondent stated in his statement of defence that a new lease for a further term of eight years commencing from January 16, 1981 was created in his favour as a result of an oral agreement on August 30, 1980 between him and Mr. Wong Phu Yin, who was then one of the owners of the demised premises. The first plaintiff and Mr. Wong Phu Yin in their respective affidavits sworn on April 10 and